United States Court of Appeals

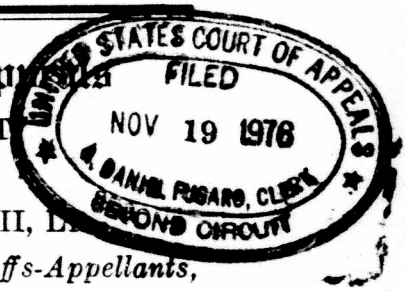
for the Second Circuit

BRIEF FOR APPELLANT

76-7454 76-7480

ORIGINAL

To be argued by
WILLIAM SCHURTMAN



United States Court of Appeals
FOR THE SECOND CIRCUIT

BIG SEVEN MUSIC CORP. and ADAM VIII, LTD.,
Plaintiffs-Appellants,

against

JOHN LENNON, APPLE RECORDS, INC., HAROLD SEIDER, CAPITOL RECORDS, INC. and EMI RECORDS LIMITED,
Defendants-Appellees,

and

MORRIS LEVY,
Additional Defendant on Counterclaims-Appellant.

BRIEF FOR APPELLANTS BIG SEVEN MUSIC CORP. AND ADAM VIII, LTD.

WALTER, CONSTON, SCHURTMAN & GUMPEL, P.C.
Attorneys for Plaintiffs-Appellants Big Seven Music Corp. and Adam VIII, Ltd.
280 Park Avenue
New York, New York 10017
(212) 682-2323

WILLIAM SCHURTMAN
ALAN KANZER
BERNARD R. DIAMOND,
Of Counsel

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BRIEF FOR APPELLANTS BIG SEVEN MUSIC CORP. AND ADAM VIII, LTD.

Preliminary Statement

Plaintiffs Big Seven Music Corp. ("Big Seven") and Adam VIII, Ltd. ("Adam VIII") appeal from a final judgment (A. 258a)*, entered August 10, 1976 in the United States District Court for the Southern District of New York (Judge Thomas P. Griesa) which:

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* References to the Appendix will be preceded by the letter "A" and references to material in the first volume of the Appendix will be succeeded by the letter "a". References to plaintiffs' exhibits will be preceded by "PX" and defendants' exhibits by "DX". Page references to exhibits which have been included in the Appendix will be preceded by "E".

1. Dismissed plaintiffs' claims for breach of contract, interference with contract, violations of the Sherman Act and other torts.

2. Awarded compensatory and punitive damages totalling $419,800* plus interest and injunctive relief against Adam VIII and Morris Levy ("Levy") on certain defendants' counterclaims.

3. Awarded Big Seven damages of $6,795 against defendant John Lennon for his breach of an earlier court-approved settlement but denied Big Seven's claims for additional damages and specific performance.

The judgment followed a three-phase trial without a jury and was based on six separate decisions by Judge Griesa rendered on February 20, 1976 (A. 152a) (reported at 409 F. Supp. 122), April 8, 1976 (A. 3458), July 13, 1976 (A. 181a), July 23, 1976 (A. 4194), August 3, 1976 (A. 4222) and August 5, 1976 (A. 4271).

During the pendency of this appeal, Big Seven, Adam VIII and Levy entered into a settlement agreement with Capitol Records, Inc. ("Capitol") and EMI Records Limited ("EMI"), pursuant to which Big Seven, Adam VIII and Levy withdrew their appeal as to Capitol and EMI.

The Stipulation of Irrevocable Withdrawal of Appeal, which was filed with this Court on November 16, 1976, specifically provides that Big Seven, Adam VIII and Levy do not admit to any wrongdoing or liability to any party to this appeal, and reserve their right to raise on their remaining appeal, and to refer to any evidence adduced or offered at trial relating to, any issue which Big Seven, Adam VIII or Levy could raise absent their settlement

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* The trial court originally awarded $429,200 but, after Adam VIII and Levy moved, pursuant to Rules 52(b) and 59(a) to amend the trial court's findings and conclusions, and for a new trial, Lennon stipulated that his damage award should be reduced by $9,400, an amount (payable to the American Federation of Musicians) which Adam VIII and Levy contended defendants had failed to take into account in computing their expenses and lost profits and royalties.

with, and withdrawal of appeal as to Capitol and EMI. Since defendants Lennon, Apple Records, Inc. ("Apple") and Harold Seider ("Seider") relied heavily on evidence presented by defendants Capitol and EMI, plaintiffs and Levy specifically reserved the right to attack such evidence on this remaining appeal against Lennon, Apple and Seider.

Additional defendant on counterclaims Levy is filing a separate brief appealing from that part of the judgment which assessed compensatory and punitive damages against him and Adam VIII and granted certain injunctive relief.* In order to avoid duplication, Adam VIII will not argue its appeal on the counterclaims in this brief but instead respectfully joins in the separate brief filed on behalf of Levy.

Issues Presented for Review

1. Did the district court err in holding that plaintiff Big Seven failed to prove that on October 8, 1974 it entered into a valid oral agreement with defendants John Lennon and Apple Records, Inc. pursuant to which Big Seven's assignee, Adam VIII, obtained the right to manufacture, advertise and sell, by television promoted mail order sales in the United States only, an album of 15 or 16 rock and roll songs performed and recorded by Lennon?

2. Did the district court err in holding that Adam VIII's short-lived television promotion of Lennon's rock and roll album which sold only 1,270 copies and generated gross revenues to Adam VIII (before expenses) of less than $7,000, necessarily, immediately and directly caused defendants to lose profits and royalties of $389,800?

3. Did the district court err in failing to apply the rules of mitigation of damages to the defendants' counterclaims?

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* The total compensatory and punitive damages were $419,800 of which $145,300 was awarded to Lennon.

4. Did the district court err in assessing punitive damages of $30,000 against Adam VIII and Morris Levy under New York law when there was no evidence that the conduct of Adam VIII and Morris Levy, in relying on what even the trial court found to be at least a "tentative agreement", amounted to gross fraud aimed at the public generally and involved high moral culpability tantamount to criminality, which are the tests for punitive damages under New York law?

5. Did the district court err in awarding damages of only $6,795 to Big Seven for its losses resulting from John Lennon's breach of an earlier court-approved settlement agreement and in refusing to enforce a portion of that settlement agreement?

Statement of the Case

The Nature of the Case

This is an action for violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, breach of contract, conspiracy, tortious interference with a contract, intentional falsehood, unfair competition, fraud and prima facie tort.*

Defendants (other than Harold Seider) counterclaimed against plaintiffs and named Levy as an additional defendant on their counterclaims for copyright infringement, violations of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), misappropriation of property rights, violation of Sections 50 and 51 of the New York Civil Rights Law and fraud.

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* Plaintiffs originally sued on the common law violations in the state court and asserted only their Sherman Act claims in the federal court, which had exclusive jurisdiction. However, when the federal court ruled a few months after commencement of the action that the antitrust claims would be tried shortly thereafter, plaintiffs requested and were granted leave to amend their federal complaint to include the common law claims.

The Parties

The plaintiffs are Big Seven, a music publisher that owns the copyrights of numerous songs in the popular music field, and Adam VIII, a record company that specializes in selling phonograph records and tapes through television advertising.

The defendants are:

John Lennon, a well-known singer and songwriter of popular music who was formerly a member of the group of entertainers known as the "Beatles";

Apple, a record company owned by the Beatles (including Lennon), of which Lennon was President;

Harold Seider, Lennon's business adviser;

Capitol, one of the largest manufacturers and distributors in the United States of phonograph records and tapes of popular music; and

EMI, Capitol's British parent company, one of the largest manufacturers and distributors in the world of phonograph records and tapes of popular music.

Levy, the additional defendant on the counterclaims (who is filing a separate brief), is the president and a controlling stockholder of Big Seven and Adam VIII.

The course of proceedings and the disposition of the case below

Plaintiffs commenced this action on March 6, 1975.

Judge Griesa tried this case without a jury in three separate phases in January, March and April 1976.

The first phase of the case was limited to the issue of whether Big Seven, Lennon and Apple had entered into a new recording and licensing contract on October 8, 1974 to supersede an earlier recording and licensing agreement entered into in October 1973. The trial court rendered a written opinion on February 20, 1976 holding that while "there was a tentative agreement for Lennon to provide 15 or 16 rock and roll songs *in the event* that Lennon in fact made a record album for Levy" (emphasis in original) (A. 173a), plaintiffs had failed to prove certain essential

contract terms and that, accordingly, "no contract was entered into by Lennon or Apple granting Levy or one of his companies the right to produce and distribute Lennon's rock and roll album" (A. 178a-179a).

The second phase of the trial dealt with defendants' counterclaims for damages alleged to have been caused by Adam VIII's allegedly unauthorized television promotion and sale of the Lennon album. In a decision read from the bench on April 8, 1976 (A. 3458), Judge Griesa assessed the following damages against Adam VIII and Levy:

Compensatory damages to Capitol	$227,000
Compensatory damages to EMI	27,500
Compensatory damages to Lennon	144,700
Punitive damages to Capitol	10,000
Punitive damages to EMI	10,000
Punitive damages to Lennon	10,000
	$429,200

The trial court also granted defendants' request for a permanent injunction.

The third phase of the case dealt with Big Seven's amended claim seeking enforcement against Lennon and damages for Lennon's breach of the October 1973 recording and licensing agreement if the agreement was not superseded by a new agreement on October 8, 1974. Judge Griesa rendered a written opinion on July 13, 1976 (A. 181a) in which he awarded damages of $6,795 to Big Seven for Lennon's breach of the earlier agreement but refused to enforce a portion of that agreement.

Adam VIII and Levy moved, on August 2, 1976, to amend the district court's findings of fact and conclusions of law and, in the alternative, for a new trial. Judge Griesa denied the motion, except that, upon stipulation of defendant Lennon, he reduced Lennon's damage award by $9,400 (A. 4275).

Big Seven, Adam VIII and Levy filed a notice of appeal on September 8, 1976 (A. 263a).

Lennon made a motion on September 23, 1976, one day after his time to cross-appeal had expired, for leave to file a late cross-appeal on the ground that his attorney had forgotten to file the notice on time. Judge Griesa granted leave in a decision from the bench (A. 4344).

Statement of the Facts

This entire case had its genesis in defendant John Lennon's problems in complying with a settlement made in open court of a copyright infringement action.

The October 1973 copyright infringement settlement agreement

In an action entitled "*Big Seven Music Corp.* v. *MacLen Music, Inc. et al.*," 70 Civ. 1348 (S.D.N.Y.) (TPG), plaintiff Big Seven charged several defendants, including Apple, with infringing a musical copyright owned by Big Seven.

On the eve of trial of that action, Lennon agreed to settle the case on the following terms:

1. Lennon agreed that his "next" record album* would include three songs, the copyrights of which were owned by Big Seven.

2. Lennon further agreed that he would cause Apple to license to Big Seven three masters** from Apple's catalog

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* A record "album" is a long-playing 33⅓ r.p.m. phonograph record, containing a number of selections, as distinguished from a "single", which is a 45 r.p.m. record containing one song on each side. The same songs can also be produced on cassette tapes and 8-track tapes. The word "album" will be used in this brief (as it is in the industry) to refer to both records and tapes, except where the context requires an explicit distinction, as in the case of price differentials.

** A "master" is the master recording of a song on a magnetic tape. The master tape is normally kept in a safe place and copies of the master tape are used to manufacture phonograph records, cassette tapes and 8-track tapes for sale to the public (A. 94, 587-588).

by December 31, 1974 or, in the alternative, to record two additional songs owned by Big Seven.

The full terms and conditions of the settlement agreement (the "October 1973 Settlement Agreement") were spelled out and agreed to in open court before Judge Griesa by lawyers representing Big Seven, Apple and John Lennon and are set forth in the transcript of the proceeding (PX 11 at E 13). The terms were also set forth in a letter from Lennon's lawyers to Lennon dated October 30, 1973, which was duly countersigned by Lennon (PX 12 at E 19).

Lennon's breach of the October 1973 Settlement Agreement and Big Seven's complaint concerning the breach

Lennon's next album, which was released in September 1974, was entitled "Walls and Bridges". It included only one Big Seven song, entitled "Ya Ya", and even that rendition was an abbreviated "joke" performance lasting only fifty seconds (Lennon, A. 1906, PX 65 at E 54, PX 19).

Big Seven's lawyers promptly wrote to Apple's and Lennon's lawyers complaining about the breach and demanding a meeting to discuss the violation (PX 22 at E 22).

The October 8, 1974 meeting at the Club Cavallero (the "Cavallero meeting")

In response to the letter from Big Seven's lawyers, Seider, a lawyer who acted as Lennon's business adviser, arranged a meeting between Lennon and Levy for the purpose of discussing the breach (Lennon, A. 700-701).

The meeting took place in the evening of October 8, 1974 at Club Cavallero, a supper club in Manhattan of which Levy was a member (Levy, A. 125).

The meeting was attended by Levy, Lennon, Seider, Phil Kahl, a Vice President of Big Seven, and May Pang, Lennon's secretary (Lennon, A. 702).

There was a dispute at the trial as to whether Bernard Brown, an English music executive, was present at that

particular meeting. Lennon (A. 702), Seider (A. 1124-1125), May Pang (A. 1437) and Brown (A. 490-493) insisted that he was; Levy (A. 437) and Kahl (A. 1301) stated that they had no recollection of Brown being present that evening. It is undisputed that Brown did attend a birthday party for Lennon at Club Cavallero the *next* evening (Brown, A. 512-513).

Brown testified in great detail that he left Los Angeles the morning of October 8, landed in Newark at 2:30 p.m., met with Lennon and Pang at the Record Plant (Lennon's recording studio) from 4:00 to 5:30 that afternoon (Brown, A. 484-485) and later attended the Cavallero meeting that evening (Brown, A. 525-526, 532). Plaintiffs introduced airline schedules (PX 101 at E 106a-106b) which showed that, because of the three hour time difference between the West Coast and the East Coast, it would have been physically impossible for Brown to leave Los Angeles in the morning and arrive in Newark at 2:30 p.m.* In short, Brown was either lying or had a very poor memory.

In any event, Brown admitted that he did not participate actively in the business discussion (A. 532) and, as we show at page 14 below, his only alleged recollection of what was said during the business discussion was flatly contradicted by Lennon and Seider.

May Pang testified that she had virtually no recollection of anything Seider said during the meeting (Pang, A. 1487-1488), and admitted that she had a tendency to "tune out" of conversations (Pang, A. 1491).

Consequently, a reconstruction of what took place during the Cavallero meeting, which lasted several hours, must depend almost entirely on the testimony of Levy, Kahl, Lennon and Seider and on subsequent actions and admissions by Lennon and Seider.

While there is a dispute as to whether the parties entered into a binding oral agreement during the Cavallero

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* The October 1, 1974 Official Airline Guide (PX 101 at E 106a-106b) does not show any flights from Los Angeles that land in Newark at or about 2:30 p.m. The 10:00 a.m. flight does not arrive in Newark until 5:54 p.m.

meeting, much of what took place at that meeting is undisputed.

Turning first to the facts admitted by Lennon and Seider:

1. Lennon admitted that the purpose of the meeting was to discuss Lennon's failure to comply with the October 1973 Settlement Agreement (Lennon, A. 700, 701).

2. Seider testified that either at the Cavallero meeting or in a preceding telephone call Levy expressed reluctance to sue Lennon for non-performance of the settlement (Seider, A. 2000). According to Seider, Levy said, however, that, as a result of Lennon's breach, he, Levy, was "out of pocket" (Seider, A. 1131). Lennon also remembered that the meeting opened in this fashion and further remembered that Levy asserted that the breach had cost him perhaps $250,000 (Lennon, A. 707).

3. Lennon explained that at the time of the October 1973 settlement, he was in the midst of recording a nostalgia album of old rock and roll songs (the "oldies" album). He said he had planned to include three of Big Seven's rock and roll songs in that album (although this was not mentioned in the Settlement Agreement which merely referred to Lennon's "next" album, PX 11 at E 13). However, Lennon subsequently ran into difficulties with his producer, Phil Spector, who suspended production and absconded with the tapes (the "Spector tapes") of songs that had already been recorded (Lennon, A. 694-696).

4. After Lennon recovered the Spector tapes in July, 1974 (Defendants' Amended Joint Statement of Undisputed Facts ["Defendants' Statement of Undisputed Facts"], ¶ 25 at E 119-120), instead of completing the "oldies" album, he began another album, entitled "Walls and Bridges" (Lennon, A. 696), but did not include any Big Seven songs, except the abbreviated "joke" version of "Ya Ya" (Lennon, A. 1905-1906). Moreover, Lennon admitted that when he recorded "Ya Ya" in "Walls and Bridges", he did so without any thought of compliance with the October 1973 Settlement Agreement (Lennon, A.

1907). Seider admitted at the trial that it was his responsibility to monitor compliance with the October 1973 Settlement Agreement but that neither he nor Lennon tried to obtain Levy's permission to defer recording the additional Big Seven songs until a later album (Seider, A. 1180-1187).

5. Seider testified that Lennon gave Levy the following reasons for not completing the "oldies" album:

—Because of the delay in releasing the album, Lennon was "disgusted" with it and had "lost all desire" to complete the album (Seider, A. 2001).

—Lennon was worried about a hostile reaction from the critics if the "oldies" album were to be released through normal retail channels (Seider, A. 2006).

Lennon testified that he told Levy he was concerned about the "critics . . . lying in wait" for the album and that the critics "were not going to be hot for it" (Lennon, A. 710).

6. Defendants' Statement of Undisputed Facts, which was filed on the eve of trial (PX 102, ¶ 52 at E 125), admitted:

> "Prior to this meeting Lennon had been concerned about the Spector Tapes because there had been much publicity about the album at the time that he and Spector were recording in late 1973 and *he felt that the critical response to it would not be favorable* due to the long period of time it had taken to complete the album. *He was also concerned that the interest in nostalgia had passed and that the album would not be well received by the public or the critics.* Adding to these concerns was the poor quality of several of the titles on the Spector Tapes." (Emphasis supplied.)

7. After Lennon explained to Levy why he was reluctant and afraid to complete the "oldies" album, someone in the group suggested that perhaps the album could be released as a television promotion (Seider, A. 2006; Lennon, A. 1908; Pang, A. 1439). Levy told Lennon and Seider that

he also headed a company named Adam VIII, which specialized in selling record albums by means of television (Lennon, A. 710; Pang, A. 1439-1440).*

8. Lennon testified that he told Levy that he would like to salvage the Spector tapes and not waste the money that had been spent in producing them and retrieving them from Spector (Lennon, A. 719-720). Seider testified that Lennon agreed that a Lennon album created specifically as a television package would be a "first" and "would be a way of bypassing the normal distribution pattern and the reviews and going direct to the consumer" (Seider, A. 2006-2007).

9. Lennon testified that his enthusiasm for the "oldies" album was rekindled at the Cavallero meeting when the idea of putting it out as a television package came up (Lennon, A. 1913). Lennon testified that he immediately started to write down the titles of possible songs to be included in the finished album (A. 710) and told Big Seven's Vice President, Phil Kahl, to get together with May Pang to procure sheet music and earlier recordings of the old rock and roll songs that Lennon had in mind (Lennon, A. 713-714). Seider testified that:

> "the discussion continued with regard to the various titles and what a great idea it was, et cetera, you

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* Records and tapes are normally sold through retail stores. They are advertised in newspapers, magazines and radio and in some instances over television but the customer must go into a retail store to purchase the product. In recent years, a number of companies (including Adam VIII) have started to sell certain types of albums (usually re-releases or repackages of old hits) directly through television (Levy, A. 94). A typical Adam VIII commercial will tell the TV viewer to mail in his order and check for $4.98 to a certain post office box and receive the album by mail (Levy, A. 103). In some instances, the Adam VIII commercial will tell the viewer that he can buy the album at certain designated chain stores, such as Woolworths, which are known in the trade as "retail fulfillment centers" to distinguish them from retail stores where albums are retailed in the normal manner (Levy, A. 105-106). These television promotions are referred to in the trade as "television packages" or "televison albums" (Levy, A. 196).

know, basically in that vein, great idea and discussing titles and getting everybody enthused." (Seider, A. 2010) (See also ¶ 42 of Defendants' Statement of Undisputed Facts [PX 102 at E 123].)

10. Lennon and Seider also testified that there was a discussion that a television package would have very substantial sales (Lennon, A. 1913; Seider, A. 2031).

11. Seider testified that Lennon and Levy then began to discuss the number of songs or titles that should go into the proposed television album (Seider, A. 2011). Seider testified that Levy said that television packages usually have about 20 "cuts" (a trade term for songs) on them (Seider, A. 2011). Lennon said he did not want to include more than 10 to 12 songs, the number he normally included on his albums sold through regular retail channels (Lennon, A. 641-642, 990, 1914-1915). During the trial, Lennon explained that the greater the number of songs squeezed onto a record, the lower the quality of the record (Lennon, A. 990, 1914-1915). After further discussion, Levy and Lennon, according to Seider's testimony, compromised on 15 to 16 titles (Seider, A. 1133; A. 2011-2013). The album that was ultimately produced and is the subject of the present lawsuit did, in fact, contain 15 to 16 titles (PX 34).*

12. Seider also testified that there was a discussion at the Cavallero meeting that a television album would sell at a price in the range of $4.98 (Seider, A. 2027).

13. Lennon testified that he asked Levy to come to his recording studio the next day to listen to the Spector tapes (Lennon, A. 716).

The areas of disagreement as to what was said at the Cavallero meeting related to royalties and Lennon's and Apple's television rights.

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* Reference is made to "15 to 16" songs because one of the titles ("Rip It Up") was actually a medley of 2 songs.

Levy and Kahl testified that during the Cavallero meeting it was agreed that Lennon would receive his customary royalty of 12% of the $4.98 price, out of which Lennon and Apple would take care of obligations to Phil Spector, the original producer, and recording costs (Levy, A. 160, 161; Kahl, A. 1318, 1319) and that Levy's company would pay for the pressing, publishing, advertising, copyrights, making of the commercials and fulfillment of orders (Levy, A. 163-4; Kahl, A. 1318). Lennon testified that he left the discussion of business terms to Seider (Lennon, A. 711). Seider insisted that the royalty rate was not discussed at the Cavallero meeting although he admitted that he did discuss it at a later meeting with Levy (Seider, A. 1209-1210).

Levy and Kahl also testified that it was agreed that Big Seven was granted the right to sell the album in the United States by television mail order and that Big Seven would also receive retail fulfillment center and foreign rights if Lennon could obtain the consent of EMI (Levy, A. 167; Kahl, A. 1311, 1312, 1316).

Seider admitted that he told Levy that he thought EMI might consent in view of the fact that Lennon's contract was due to expire in January 1975 and EMI wanted Lennon to sign a new contract with EMI (Seider, A. 2037). Lennon gave the same testimony (Lennon, A. 714).*

At the time of the Cavallero meeting, Lennon's records were controlled by three interrelated contracts. Under a 1967 contract between the Beatles and EMI (DX B-1 at E 207), EMI had exclusive, world-wide rights to all of Lennon's works. In 1969, however, EMI had assigned to Apple all North American rights to Beatle (and Lennon) records (DX D at E 272), and Apple, in turn, had entered into a contract with Capitol pursuant to which Capitol

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* Bernard Brown, who claimed that he had attended the Cavallero meeting after making a physically impossible trip from Los Angeles to Newark earlier that day (see page 9 *supra*), testified that the only business discussion he overheard was Seider telling Levy that it would be "impossible" to get EMI's consent (Brown, A. 498, 499), which was squarely inconsistent with the testimony of Seider and Lennon (A. 2037, 714).

(with the exceptions hereafter described) obtained the exclusive right to distribute Beatle (and Lennon) records throughout North America (DX C-2 at E 223).

According to Levy, he pointed out to Seider and Lennon that during a negotiation for an earlier Beatles television package, he had learned from Allen Klein, the then manager of the Beatles, that there was an exclusion for mail order rights in the Capitol-Apple contract so that EMI's consent was not necessary in order for Apple and Lennon to grant United States mail order rights to Levy (A. 167, 168). Levy testified at the trial (A. 454) that this information was corroborated in an interview given by Klein to "Playboy Magazine" (PX 10 at E 3). As we show at pp. 38-40, *infra*, evidence and testimony introduced at the trial showed that Levy's understanding was correct and that the Capitol-Apple contract did in fact contain the following exclusion:

> "1. Apple hereby grants to Capitol all of the rights which Apple derives under the Licensing Contract, except . . . (ii) the distribution by mail direct to consumers . . ." (DX C-2 at E 249.)

Seider admitted that he and Levy discussed the need for EMI's and Capitol's consent but insisted that he told Levy that Seider would first have to discuss the matter with EMI (Seider, A. 1135).

Levy and Kahl testified that it was their firm understanding at the conclusion of the Cavallero meeting that the parties had agreed to cure Lennon's breach of the October 1973 Settlement Agreement by entering into a superseding agreement for the completion of the rock and roll album and its marketing as a television package by one of Levy's companies (Levy, A. 173, 1686-1687; Kahl, A. 1318).

Seider and Lennon denied that a final agreement was reached (Seider, A. 1137, Lennon, A. 999), but did not explain how the parties had agreed to resolve the breach of the October 1973 Settlement Agreement, which, after all, was the admitted reason for the Cavallero meeting. The

fact is that the October 1973 Settlement Agreement, let alone its breach, was never mentioned again until several months later when Lennon's lawyers sent Levy a letter (PX 30 at E 29) which asserted that the October 1973 Settlement Agreement was still in effect and made no reference whatsoever to the October 1974 Cavallero meeting. (See page 26 *infra.*)

Reasons why the oral agreement was not reduced to writing

There was extensive testimony at the trial that it is customary in the record industry for parties to make binding oral commitments involving substantial sums of money with the "paperwork" to follow later (Seider, A. 1010; Kives, A. 843, 844, 845; Masucci, A. 384, 415; Brown, A. 525; Levy, A. 194-195).

For example, Seider admitted that Lennon and Apple did not have a written contract with Phil Spector governing his production of the rock and roll "oldies" album (Seider, A. 2055).

Judge Griesa told counsel during the trial:

> "I would assume that you could have witnesses come in and testify that under various circumstances oral agreements are made and certain actions are taken upon these oral agreements and so forth. I will assume that you could produce such evidence. I think that neither of these points is worth a lot more trial time, because neither of those points, in my view, is critical to the questions as now framed about the existence of the contract. Indeed, I would assume you can have a dozen people come in and testify along the lines as Mr. Masucci did." (A. 1841.)

Judge Griesa further stated to plaintiffs' counsel:

> "(I)f I find that there was an oral contract on October 8, 1974, that is not within the statute of frauds or covered by the statute of frauds, I won't find it contrary to industry practice. I have tried to explain that at some length." (A. 1872.)

Levy testified that when he subsequently asked Seider to reduce the oral agreement to writing, Seider requested that a written agreement be deferred until after January 1, 1975. Seider explained that the Beatles, who had quarreled and split up as a group several years earlier, and who were engaged in litigation with each other, were in the process of trying to work out a settlement agreement and that such an agreement would make it possible for Lennon to retain his full share of royalties for the television package (Levy, A. 193, 282, 293).

Seider admitted that he told Levy that the proposed Beatles settlement would entitle each individual Beatle to retain full royalties on records he made himself (Seider, A. 2038). Seider was unable to explain why he would volunteer such information to an outsider like Levy unless Levy had a legitimate business interest in this information (Seider, A. 2039).

The evidence at the trial showed that the Beatles did, indeed, enter into a settlement agreement, dated December 29, 1974, which provided:

> "All individual recordings and all income arising therefrom shall be treated as included in the Partnership business up to the 1st October 1974 but shall belong thereafter to the individual Beatle responsible for such activity." (PX 84 at E 66.)

In response to defendants' Statute of Frauds defense,* there was extensive testimony by Levy and executives of other companies which specialize in television packages that the production, promotion and fulfillment of the Lennon television package could have been completed in less than a year (Levy, A. 108; Kives, A. 863, 869; Dyczko, A.

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* New York General Obligations Law § 5-701 provides in pertinent part:

> "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> 1. By its terms is not to be performed within one year from the making thereof . . ."

667-668). In any event, Judge Griesa did not rule that the agreement was barred by the Statute of Frauds.

Levy's October 9, 1974 visit to the Record Plant

As agreed at the Cavallero meeting, Levy visited Lennon the next day at Lennon's recording studio, the Record Plant, to listen to the Spector tapes in order to determine which could be salvaged and included in the television package (Levy, A. 206-207; Lennon, A. 720).

Lennon furnishes a list of song titles to Levy and Kahl

Lennon furnished Levy and Kahl with a list of song titles that Lennon wanted to consider for inclusion in the television album (PX 24 at E 26). Portions of the list are in Lennon's own handwriting (Lennon, A. 1926-1927). The rest was typed by May Pang (Pang, A. 1510).

It should be noted that many of the songs were not from the Big Seven catalog (Pang, A. 1523) so it cannot be assumed, as was suggested by defendants, that Levy and Kahl were interested in helping Lennon obtain the songs on this list simply because their inclusion in the album would generate additional copyright royalties for Big Seven.

The collaboration of Phil Kahl and May Pang

As agreed at the Cavallero meeting, Phil Kahl and May Pang worked together assembling sheet music and old records of the additional songs which Lennon wanted to consider for inclusion in the television album (Pang, A. 1512-1514, 1523; Kahl, A. 1310, 1322, 1323, 1337-1338).

Lennon's rehearsals at Levy's farm

On October 14, 1974 Levy and Lennon were discussing the new album. Lennon told Levy that he was bringing in musicians from various parts of the country and needed a quiet place to rehearse. Levy suggested that Lennon and

the musicians rehearse at Levy's farm in upstate New York, where Levy had a big house with adequate guest facilities. Lennon agreed (Levy, A. 219; Lennon, A. 722-724).

Lennon and five of his musicians spent October 17-20, 1974 at Levy's farm rehearsing the songs to be included in the television album (Defendants' Statement of Undisputed Facts, ¶¶ 59 and 61 [PX 102 at E 127]; Lennon, A. 722-725). Phil Kahl arranged for musical instruments to be shipped to the farm for the rehearsal and he and May Pang arranged for the necessary sheet music (Levy, A. 219-220; Kahl, A. 1329-30; Pang, A. 1513). Lennon testified that he and his musicians rehearsed many hours in the morning, afternoon and evening of Friday and Saturday (Lennon, A. 725; Pang, A. 1516).

Lennon's statements at the farm that he was working on a television album for Levy

Several persons who were at the farm that weekend testified that they had heard Lennon discussing the album and saying that he was making a television package for Levy.

William Chapman, the director of a savings and loan association in Miami, Florida, testified that when he met Lennon at Levy's farm:

> "I asked him what he was doing there. He said 'I am making a record for Morris' . . ."
>
> • • • •
>
> "Q. Did you hear Mr. Lennon make any other comments about the record that he was making?
>
> A. At the dinner table there was conversation about the price of an album which was going to be made. I believe the area of $5 was—the subject bounced back and forth." (PX 100 at E 101.)

Jerry Masucci, the president of Fania Records (Masucci, A. 375), testified that he heard Levy and Lennon discuss the "oldies" album at length:

> ". . . I remember being at the table with Mr. Levy and Mr. Lennon. And, whether Mr. Levy or Mr.

Lennon said, or both said, discussed the songs that would be in the album, and what a great idea it was, and how, you know, incredible it would be.

I remember specifically them saying that the album would be so good that even disc jockeys would have to pay for it.

• • • •

Q. Did Mr. Lennon state, in words or substance for whom he was recording the album in question?

A. Yes, he did.

Q. What did he say?

A. He said the album was going to be for Mr. Levy.

Q. Was there any discussion about price?

A. Yes, there was.

Q. What was said and by whom?

A. I think Mr. Levy said it was going to be a $4.98 album.

Q. Was that said in Mr. Lennon's presence?

A. Yes, it was." (Masucci, A. 380-381.)

Masucci further testified that either Lennon or Levy (in Lennon's presence) said that the album Lennon was making was of a type of material never before recorded by Lennon, and would be "spectacular" (Masucci, A. 382).

Norman Sheresky, a lawyer who was visiting Levy's farm with his daughter, testified that he observed May Pang working at a typewriter at the farm, asked her what she was doing, and she said her work involved "a recording that was going to be made by Mr. Lennon for Mr. Levy, I believe, the following Monday or Tuesday." (Sheresky, A. 2022.) Sheresky also testified that Levy and Lennon discussed how much money they would make from the recording (Sheresky, A. 2023). Sheresky testified further that while they were watching television at the farm, they saw commercials for records or cassettes and Levy and Lennon explained that this was the kind of promotion that would be used for their recording (Sheresky, A. 2023).

The recording of the album

On Monday, October 21, 1974, the day after completing their rehearsals at Levy's farm, Lennon and his musicians went to the Record Plant and began to record the additional songs that were to be included in the television album, along with a number of songs from the salvaged Spector tapes. The recording sessions were completed on October 25, 1974 (Lennon, A. 727).

Lennon's delivery of a 7½ i.p.s. tape to Levy

Once an artist (whether alone or accompanied by other musicians) finishes recording an album, there is still a great deal of technical work that must be done before the master tape is ready.

Lennon testified that after the basic tracks were laid at the Record Plant on October 21-25, 1974, he added saxophones and trumpets (A. 909-910), which took about five days (A. 911), then remixed all of the vocal portions until the entire performance was on two 15 inch per second ("i.p.s.") two-track tapes (A. 911, 913), a pro[illegible] which was completed by early November (A. 912-913).

A few days later, Lennon arranged for the Record Plant to deliver to Levy a 7½ i.p.s. tape of all of the rock and roll songs he had recorded (Lennon, A. 730-732).

Lennon now claims that he delivered this tape to Levy only for "listening purposes", that it is not customary to use a 7½ i.p.s. tape to produce the final albums, and that a faster (and hence better quality) 15 i.p.s. tape is customarily used for final production (Lennon, A. 682, 732-733). However, May Pang, Lennon's secretary, testified that she knew of no other instance where Lennon had given a 7½ i.p.s. tape to anyone for "listening purposes" and that it was Lennon's practice to deliver tapes only to companies which were to manufacture and distribute the actual records (Pang, A. 1522, 1523).

Furthermore, plaintiffs presented extensive testimony and documentary evidence that many record companies, including such major ones as Columbia, Atlantic, United Artists, Decca and MCA, at times use 7½ i.p.s. tapes for

final manufacture, particularly in the case of television albums (PX 80 at E 56; Levy, A. 250, 255; Kives, A. 851).

Levy also testified that when Lennon arranged for Levy to get the 7½ i.p.s. tape, Lennon said:

> "'It's finished . . . We all worked hard. I don't want to hear the damn thing again. I have had enough of it. I'm that way after I complete an album. I get to hate them after I complete them, because I have done nothing but listen to them for a few weeks now, and it's your baby.' At that point I suggested that I would like to have the tape." (Levy, A. 242-243.)

Kahl testified that Lennon told Levy:

> "It is finished; it is great; I don't want to hear it anymore, it is your baby." (Kahl, A. 1349.)

Lennon's statement to Frankie Crocker that he was making a television album for Levy

Frankie Crocker, a popular disc jockey, testified that he was at Club Cavallero in November 1974 when he met Levy who, in turn, introduced him to Lennon (Crocker, A. 1149). Crocker then gave the following testimony:

> "We [Levy, Lennon, Crocker and Pang] were talking about music, music business. We were talking about a new album that John [Lennon] was doing. . . . Morris told me that he was going to have an album out on John and it was going to deal with oldies.
>
> Q. Was that statement made in Mr. Lennon's presence?
>
> A. Yes.
>
> Q. Did Mr. Lennon at any time make any reference to th[illegible]m to which you were referring?
>
> A. [illegible] we had discussed an interview,* I was go-

* Crocker testified that among the prominent recording artists whose interviews he had conducted on his program were the Rolling Stones, Elton John, Aretha Franklin, and the Temptations (A. 1154).

ing to play the album on the air—

Q. Now, during the time when he [Lennon] referred to this album, did he refer to it in any particular way or describe what was o it or make any references to the album?

A. Yes, he said Stand By Me was one of the cuts that was going to be on it. Be My Baby was the other one. And it was referred to as an album that would be sold on television and there wouldn't be any promotional copies, you would have to pay for it. And I guess it was generally referred to as Mr. Levy's, Morris' album.

Q. Was there any discussion as to when you might be able to hear any of the selections that would be on this album?

A. Yes, the next day.

Q. Who said what about listening to the album?

A. I guess I had asked if they had an album with them, and they said no, and I could come up to Morris' office the next day and hear it, which I did." (A. 1151-1153.)

Repeated efforts by defendants' attorneys to shake Crocker's testimony were totally unsuccessful (A. 1158-1162).

Lennon admitted that he met Crocker that evening (A. 1933), that they discussed the "oldies" album (A. 1933), that they joked about having disc jockeys pay for the album (A. 1935), and that Crocker expressed interest in being the first disc jockey to play the album (A. 1935). May Pang had no recollection of what was said (A. 1523-1524).

Levy's further talks with Seider

Following the Cavallero meeting, Levy had several telephone conversations and one meeting with Lennon's business adviser, Seider, at which the television package was discussed. Levy testified that he kept asking Seider to contact EMI to obtain consent for Levy to distribute the

television album through retail fulfillment centers and on a world-wide basis (Levy, A. 1863-1864). As noted earlier, at page 15, *supra*, it was Levy's understanding that EMI's consent was not required in any event for United States mail order sales because of the exclusion in the Apple-Capitol contract. Seider testified that he kept telling Levy that it was premature to seek EMI's consent until Lennon had finished recording the album (Seider, A. 1135-1136, 1195, 2059-2060).

In November 1974 Levy met with Seider and Michael Graham, an attorney who represented Lennon. Levy testified that the purpose of the meeting was to discuss a new proposal by Seider to have Levy and EMI enter into a joint venture to promote Lennon's television album in Europe but that they could not agree on terms and that Levy accordingly decided to stick to the original deal (Levy, A. 278, 283). Seider admitted that they discussed the possibility of such a joint venture (Seider, A. 1202), but claimed that he rejected Levy's proposal because Lennon would not receive his normal royalty (Seider, A. 1213-1214). Seider's testimony was supported by Lennon's attorney, Graham (Graham, A. 798-799), who produced notes which he claimed to have reconstructed after the meeting and which purported to show that Lennon would receive a royalty of only $.23 per record, rather than the $.60 (*i.e.*, 12% of $4.98) that Lennon would normally receive (DX GGGG at E 491). Although Graham claimed that the discussion involved mail order sales in the United States and was for the purpose of establishing the terms of a proposed contract for such sales (Graham, A. 796-801), Graham's notes show on their face that the discussion could not have related to United States mail order sales since the notes show an expense of "Profit to Stores . . . $1.50", and mail order sales bypass all stores. (DX GGGG at E 491.)

Levy also testified that in November 1974 Seider told him that it was unnecessary to see EMI in England and that there would be no problem with Capitol (Levy, A. 293, 294). As we show below, Levy thereupon assumed

he was also getting retail fulfillment center and foreign rights, which, unlike United States mail order rights, had depended on EMI's consent. When it later developed during the trial that Seider had not in fact obtained EMI's and Capitol's consent for retail fulfillment center and foreign rights, plaintiffs limited their claim to United States mail order rights, which clearly did not require EMI's consent in view of the express exclusion in the Apple-Capitol agreement relating to mail order rights.*

Levy's and Lennon's trip to Florida

In December 1974 Levy invited Lennon and his son to be his guests in Florida during the Christmas holidays (Levy, A. 296-297; Lennon, A. 934).

Norman Sheresky, the lawyer who had been visiting Levy's farm in October 1974, where he heard Lennon say that he was making a television package for Levy, was also spending the Christmas holidays in Florida. Sheresky testified that on one occasion during his stay he encountered Lennon and the following conversation ensued:

> "Q. Did you have any conversations with Mr. Lennon?
>
> A. Yes. I asked Mr. Lennon how the record was going that he was doing with Mr. Levy. I presume he said fine. I don't remember what he said about it. He said, 'Fine, it's okay'.
>
> * * *
>
> Q. When you say you don't remember Mr. Lennon's

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* Contrary to Judge Griesa's statement in his opinion (A. 168a), plaintiffs did not experience "difficulty in formulating the terms of the contract" on this point. Levy fully explained the differences in his deposition (A. 1834-1835) and again at trial (A. 1863-1864) and plaintiffs' counsel explained in his opening statement (A. 28-30, 38) that it was plaintiffs' position that the United States mail order rights had been granted on October 8, 1974 and that such grant did not require the consent of EMI or Capitol but that plaintiffs' claim to retail fulfillment and foreign rights was predicated on Seider's subsequent statement to Levy that it was unnecessary to see EMI and that there would be no problem with Capitol.

exact response during that conversation when you asked him about the recording he was doing with Mr. Levy, do you recall whether he said, 'I am not doing any recording with Mr. Levy'?

A. Oh, no. He said, 'Fine. Good.' He gave me some response. He certainly didn't say that, no." (A. 2025.)

While Levy and Lennon were in Florida, Seider visited Lennon for the purpose of discussing the final Beatles settlement agreement. Levy testified that he had a conversation with Seider, before Seider returned to New York, during which Seider again assured him that there were no problems and that the deal was all set (Levy, A. 293). Seider admitted that a conversation took place but testified that he told Levy that he was pessimistic that EMI would consent and that Levy threatened to sue Lennon if a problem were to arise (Seider, A. 1229-1230). As we show below, at the time this conversation took place Seider had not yet taken up the question of consent with EMI or Capitol, a fact which he concealed from Levy.

The December 31, 1974 letter from David Dolgenos and Levy's response dated January 9, 1975

Levy returned to New York in early January 1975 (Levy, A. 314) and found awaiting him a letter dated December 31, 1974 from David Dolgenos, one of Lennon's attorneys (PX 30 at E 29), stating that Lennon and Apple were now ready to proceed with the second phase of the October 1973 Settlement Agreement, which called for Lennon to cause Apple to license three masters to Big Seven before December 31, 1974 (see pages 7-8, *supra*).

The letter made no reference to the fact that Lennon had already failed to comply with the first phase of the October 1973 Settlement Agreement nor did it refer to the Cavallero meeting or subsequent events.

Levy immediately wrote the following letter (PX 31 at E 30) to Dolgenos:

"I was surprised, to say the least to receive your letter dated December 31, 1974. The stipulation of settle-

ment entered into on October 14, 1973, was breeched by John Lennon and since that time this entire matter has been resolved during meetings with John Lennon, Harold Sider, (John Lennon's attorney) and myself. In accordance with the agreement reached during those negotiations, John Lennon has recorded sixteen (16) sides which I will market throughout the world by use of television advertising. Please adjust your records to indicate that the original stipulation is no longer of any effect."

Although Dolgenos, several other Lennon lawyers and Seider all read this letter from Levy, it was never answered (Seider, A. 2089-2090).

Seider's negotiations with Capitol

Although Levy was unaware of it until the story came out during discovery and at the trial, Seider—who testified that he had repeatedly assured Levy that he was seeking the consent of EMI and Capitol for Levy to market Lennon's television album—in fact concealed Levy's claims from Capitol* and tried to persuade EMI or Capitol to release the album themselves through regular retail channels (Menon, A. 2137). At the same time, Seider deliberately concealed from Levy that Capitol was itself planning to put out the Lennon album (Levy, A. 323).

Seider contacted EMI in December 1974 and was told to discuss the Lennon album with Capitol (Seider, A. 1222-1223).

On January 9, 1975 Seider met in Los Angeles with Al Coury, a senior vice president of Capitol, who suggested that Seider talk to Bhaskar Menon, the President of Capitol (Seider, A. 1248).

On January 14, 1975 Seider met with Coury and with Menon (Seider, A. 1249). Not only did Seider not seek Capitol's consent as Seider had repeatedly assured Levy

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* Judge Griesa specifically found that Seider "dissembled" and "concealed from Capitol and from EMI" Lennon's dealings with Levy (A. 3476).

he would try to do, but he actively sought to discourage Capitol from allowing Lennon to do a television package with Levy. As Menon recalled their conversation, after Seider told him of Levy's request:

> ". . . he [Seider] said *he didn't believe I would have interest in such a proposal.*" (Emphasis supplied) (Menon, A. 2137.)

Although Dolgenos had telephoned Seider on January 13, 1975 and had read to him the contents of Levy's January 9, 1975 letter (Seider, A. 2081), Seider did not tell the Capitol executives that Levy claimed to have a contract with Lennon for the television album (Seider, A. 2081; Menon, A. 2449-2450) nor did he tell them that Lennon had already delivered a tape of the album to Levy (Seider, A. 2097-2098).

Instead, Seider arranged a meeting in New York for Coury to persuade Lennon to let Capitol market the album through regular retail channels and such a meeting did take place on January 28, 1975 (Seider, A. 1251).

Seider admitted at the trial that the "only way Capitol could get the album [was] if Lennon gave it to them" (A. 2112). Coury and other Capitol personnel made a determined effort on January 28 to persuade Lennon that he would be better off letting Capitol market the album through regular retail channels instead of as a television package (Seider, A. 1255-1256).

Lennon testified that until the January 28, 1975 meeting with the Capitol representatives, he had fully intended to put out the album as a television package (Lennon, A. 1002, 1916) and had planned to do so through Levy (Lennon, A. 1916-1917), but that Capitol persuaded him to take it away from Levy and let Capitol distribute it through regular retail channels (Lennon, A. 1002).

Coury's failure to attend a scheduled meeting with Levy

Seider testified that the January 28 meeting between Lennon and Capitol broke up very late at night and that

the next day Seider called Levy and told him that Lennon had decided to distribute the "oldies" album through normal retail channels and not on television. Seider asked whether he and Coury could come to see Levy that afternoon to discuss this matter (Seider, A. 1263-1264).

Seider further testified that he and Coury were to meet at Lennon's office in New York before going to see Levy, but Coury failed to show up (Seider, A. 1264-1266).

The defendants, in their Statement of Undisputed Facts (PX 102 at E 134), admitted that Coury "had been told by Menon that he should not attend the meeting".

Levy testified that he met with Seider on January 30, 1975 without Coury and told Seider that Adam VIII would release the Lennon album (A. 325).*

Levy's attempts to contact Capitol, EMI and Lennon

Seider admitted that Levy repeatedly asked him to call Capitol to arrange for Levy to discuss the matter directly with a Capitol executive but that Seider refused to do so (Seider, A. 1273).

Levy also called Allen Klein and told him Adam VIII would release the Lennon album. When Klein said he would inform Menon of Levy's intentions, Levy stated:

> "Fine, call him. I would like to talk to him." (Klein, A. 1587.)

Klein testified that Levy asked him several times to set up a meeting between Menon and Levy, and that Klein attempted to do so, but that Menon declined, saying:

> ". . . it was a complicated situation, that he, Capitol, did not want to involve themselves in, that it was a problem of Mr. Lennon and Mr. Levy, and that Capitol would await the instructions of Mr. Lennon." (Klein, A. 1588.)

Defendants, in their Statement of Undisputed Facts, admit Levy attempted to contact EMI and Capitol and

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* Big Seven had assigned its rights to Adam VIII, the television marketing company, on December 11, 1974 (PX 28 at E 27).

that EMI and Capitol refused to speak to him:

> "98. Following the Seider meeting, Levy attempted to call Len Wood at EMI in London and called Larry Utal, a friend of Levy's in an attempt to arrange a meeting with Wood and Menon.
> 99. Levy also called Klein, who in turn called Menon. Both Wood and Menon declined to return Levy's call." (PX 102 at E 135.)

Defendants also admit that:

> "Immediately following this meeting [with Seider], Levy notified Lennon through Pang that he was putting out the Roots album* . . . and that if Lennon wanted to change or remix the tapes, or do something with the art work or title . . . he should do so right away." (PX 102 at E 134-135.)

Lennon did not return Levy's call (PX 102 at E 135).

Defendants' use of threats and economic coercion to cause a boycott of "Roots"

Before leaving Levy on January 30, 1975, Seider told him that Capitol would seek an injunction against Levy's release of the album (Seider, A. 1272).

After notifying Capitol and Lennon of its plans, Adam VIII proceeded to press, release and advertise the "Roots" album and at the same time prepared to fight off any injunction (Levy, A. 1828).

Adam VIII arranged for the "Roots" album to be pressed (Levy, A. 329-331), for jackets to be printed by Ivy Hill Lithographers (Levy, A. 329) and for the filling of mail orders to be handled by RCA (Levy, A. 343-344). Adam VIII also produced two television commercials for the album and arranged for a number of television stations

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* The Lennon rock and roll album which was released by Adam VIII was entitled "Roots". Levy testified that he had discussed this title with Lennon at an earlier point in time (Levy, A. 216). The title reflected the fact that the old rock and roll songs performed by Lennon were the roots of the current popular music (Levy, A. 216).

throughout the United States to run these commercials (PX 103; Levy, A. 331-332).

The "Roots" album was released on February 7, 1975 and the television commercials began to appear on February 8, 1975 (Levy, A. 342).

There was testimony at the trial that defendants gave serious consideration to seeking a preliminary injunction but concluded that such an application for judicial relief was likely to fail (Seider, A. 2123-2124, Menon, A. 2548).

Defendants thereupon decided to bypass the courts and to use Capitol's economic power to cause Adam VIII's suppliers and television stations to boycott the "Roots" album. Beginning on February 7, 1975 Capitol and Lennon sent telegrams to Adam VIII's pressing plant, jacket printer, advertising agency, RCA (the company which was to fill the mail orders) and to the television stations warning them that they would be sued for damages if they handled the Adam VIII album (Menon, A. 2399, 2430; PX 41A-P at E 31-47).

Defendants' boycott campaign proved to be highly successful. Many of Adam VIII's suppliers and the television stations bowed to defendants' pressure and said that they could not risk litigation with Capitol (Levy, A. 353; Dyczko, A. 657).

The pressing plant refused to press further albums (Levy, A. 354); the printer refused to print further jackets (Levy, A. 352-353); RCA refused to fill any further mail orders (Levy, A. 353); and a number of television stations refused to honor their commitments to run Adam VIII's commercials (Levy, A. 352).

As a result, Adam VIII's commercials ran on a very limited number of television stations for only a few days from February 8 to 16, 1975 and Adam VIII was able to sell only 1,270 copies of "Roots" before the album was forced off the air and out of the marketplace (Levy, A. 353).

On February 13, 1975, Capitol released its own slightly altered version of the same album, entitled "Rock 'n' Roll", of which it sold 342,000 copies through regular retail channels in the United States alone (PX 110 at E 153).

In short, by following the economic boycott route, defendants achieved all of the results they could have obtained if a court had granted them full injunctive relief without the need to submit their claims to judicial scrutiny and without having to put up a bond. Plaintiffs contended that this boycott constituted a violation of the Sherman Act (see *Klor's* v. *Broadway Hale Stores, Inc.*, 359 U.S. 207 [1959]) and commenced the present antitrust action. Since the trial court concluded that plaintiffs had failed to prove the existence of a contract authorizing Adam VIII to release the "Roots" album, the trial court did not rule upon plaintiffs' Sherman Act claims.

ARGUMENT

I

The Trial Court erred in holding there was no enforceable oral agreement for the completion and television marketing of Lennon's rock and roll album.

Big Seven and Adam VIII contend, for the reasons hereinafter set forth, that the district court erred in holding:

1. that Big Seven, Lennon and Apple reached only a *tentative,* as opposed to a *final* agreement for the completion and television marketing of Lennon's rock and roll album;

2. that Big Seven failed to adduce sufficient evidence of the amount and method of calculating Lennon's royalties; and

3. that Big Seven failed to prove that Lennon agreed to have Levy sell the album only through mail order.

A. The legal standards for reviewing Judge Griesa's holding

Rule 52(a) of the Federal Rules of Civil Procedure provides that a district court's:

> "[f]indings of fact shall not be set aside unless clearly erroneous",

and this Court has held that the same standard of review:

> ". . . applies also to factual inferences from undisputed basic facts," (*Coalition for Ed. in Dist. 1* v. *Board of Elec., City of New York*, 495 F.2d 1090, 1093 [2d Cir. 1974], quoting from *C.I.R.* v. *Duberstein*, 363 U.S. 278, 291 [1960]).

However, the Supreme Court has held that the trial court's ultimate conclusion that a party's conduct does or does not violate his obligations to others:

> ". . . is not to be shielded by the 'clearly erroneous' test . . ." (*United States* v. *General Motors Corp.*, 384 U.S. 127, 141n [1966]).

Moreover, in determining whether a statement is a "finding" or "conclusion", the trial judge's characterization of it is not binding on the appellate court. *In re Joseph Kanner Hat Co., Inc.*, 482 F.2d 937 (2d Cir. 1973).

Consequently, although Judge Griesa states that he "finds" that ". . . plaintiffs have not *shown* that there was any agreement on the amount or method of calculation of the royalty" (emphasis supplied) (A. 173a-174a) and "finds" that the agreement between Lennon and Levy was "tentative" (A. 173a), his "findings" are actually ultimate conclusions of law, because he is not expressing an opinion as to the relative credibility of plaintiffs' and defendants' proof, but rather as to the legal sufficiency of plaintiffs' proof to establish the existence of a contractual relationship.

Furthermore, in deciding whether Judge Griesa's *factual* determinations should be followed, this Court should overturn his findings if it concludes, after considering all of the evidence that it has a "definite and firm conviction that a mistake has been committed". *Zenith Radio Corp.* v. *Hazeltine*, 395 U.S. 100, 123 (1969). See also, *Coalition for Ed. in Dist. 1* v. *Board of Elec., City of New York, supra.*

B. Judge Griesa's conclusion that there was a tentative agreement

Judge Griesa stated:

> "I find, on the basis of the evidence, that there was a tentative agreement for Lennon to provide 15 or 16 rock and roll songs *in the event* that Lennon in fact made a record album for Levy. However, I find that plaintiffs have not shown that there was any agreement on the amount or method of calculation of the royalty." (A. 173a-174a) (Emphasis supplied by the court.)

We respectfully submit that the district judge erred when:

1. He rejected or played down the significance of the evidence which showed that following the October 8 Cavallero meeting Lennon did indeed make the record album for Levy and told a number of independent witnesses that he was doing so.

2. He held that there was no agreement on the amount or method of calculation of the royalty.

C. The evidence showed that Lennon in fact made the record album for Levy

In order to prove the existence of a contract, and particularly an oral contract, and to show that there was indeed a meeting of the minds, it is necessary and proper to consider evidence of the parties' subsequent conduct and admissions. McCormick, *Evidence*, §§ 229, 269 (1954); Wigmore, *Evidence*, § 272 (1940). Cf. *Hellenic Lines, Ltd.* v. *Gulf Oil Corp.*, 340 F.2d 398 (2d Cir. 1965).

The evidence, as fully documented in our Statement of the Facts at pages 18 *et seq.*, *supra*, showed that after the Cavallero meeting, Lennon took the following actions and made the following admissions to independent witnesses:

1. Lennon invited Levy to his recording studio to listen to the Spector tapes which he wanted to salvage for inclusion in the television album.

2. Lennon gave Levy and Kahl a list of additional song titles that he was thinking of including in the television package and Kahl and May Pang then proceeded to pull together the necessary sheet music and old recordings of these songs for Lennon's use.

3. Lennon and his musicians spent several days rehearsing the new album at Levy's farm.

4. While at the farm, Lennon told a number of visitors, including a banker, a record company executive and a lawyer, that he was making a television album for Levy and the nature of the contemplated television promotion and the $4.98 price of the album were specifically discussed by Lennon or in Lennon's presence.

5. As soon as Lennon completed the recording of the 15-16-song made-for-television album, he furnished Levy with a 7½ i.p.s. tape which, according to the evidence, could be (and indeed was) used to manufacture the album.

6. In November 1974, Lennon told Frankie Crocker, a well-known disc jockey, that he had just completed an album for Levy which would be sold as a television package and Crocker was invited to listen to the album in Levy's office.

7. In December 1974, while in Florida as Levy's guest, Lennon again discussed with the lawyer he had met at Levy's farm in October that he had made an album for Levy.

8. When Lennon's lawyers wrote a letter to Levy on December 31, 1974 indicating that the old October 1973 copyright settlement was still in effect, Levy immediately replied on January 9, 1975 that the 1973 settlement had been superseded by the television album agreement. Levy's letter was never answered.*

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* During the summations on Phase I of the case, Judge Griesa pointedly observed:

"I am concerned about the fact that no answer was written to

(footnote continued on following page)

9. Lennon testified that until January 28, 1975, when Capitol (at Seider's urging) persuaded Lennon to bypass Levy and to release the made-for-television album through normal retail distribution, Lennon had fully intended to put out the album as a television package through Levy.

In short, even if one ignores all of Levy's and Kahl's testimony and looks only to the testimony of Lennon and independent witnesses, there was overwhelming evidence that Lennon intended to and did make the album as a television package to be marketed by Levy.

Judge Griesa, however, drew no inferences from Lennon's conduct relating to the assembling of the music by Kahl and Pang, the rehearsals at Levy's farm and other actions showing that Lennon was making the album for Levy. The trial judge also brushed aside the uncontradicted testimony of a number of witnesses that Lennon had told them he was making the album for Levy, saying:

> "On a few occasions Lennon made statements to musicians and to friends of Levy that he was making an album for Levy. Plaintiffs cite these as evidence of the existence of a contract. But such casual statements are inadequate to compensate for the fact that the terms of a contract had not in fact been worked out." (A. 175a).

Judge Griesa did not question the credibility of the banker, the lawyer, the record executive and the disc jockey

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(footnote continued from preceding page)

> Mr. Levy's letter of January 9 If I got that letter claiming a contract with me and if I didn't have a contract, I would get to my secretary so fast with a letter back to Levy denying that. I know I would have a messenger practically at the door carrying it there. It is inconceivable to me that that was not done. Isn't that an admission maybe there was a contract?" (A. 2282.)

In *Hellenic Lines, Ltd.* v. *Gulf Oil Corp., supra,* this Court held that where a party failed to respond to a letter that purported to set forth the terms of an oral agreement, his silence could be found to constitute an admission. See also, *Willard Helburn, Inc.* v. *Spiewak,* 180 F.2d 480 (2d Cir. 1950).

who testified as to their independent recollection of what Lennon had told them,* so that his conclusion that these statements were "casual" does not detract from the fact that they were admissions against interest. At the very least, they showed that until the end of December 1974, and, indeed, even until January 28, 1975 when Capitol persuaded him not to do the album with Levy (Lennon, A. 1002), Lennon thought that he was making the album for Levy.

Thus, on the basis of the trial court's own analysis of the case, we have:

1. A tentative agreement by Lennon to provide 15 or 16 rock and roll songs *in the event* that Lennon in fact made the record album for Levy, plus

2. Lennon's conduct and admissions showing that he did in fact make the record album for Levy.

D. The trial court's conclusion concerning the granting of mail order rights

A television album can be sold in either of two ways: (1) by mail order, in which case a viewer mails in his check and receives the album through the mails; or (2) through "retail fulfillment centers" designated in the television commercial. These retail fulfillment centers are usually chain stores which display and sell the television albums as part of the special television promotion and enable the viewer to buy the advertised album in person (Kives, A. 762; Seider, A. 1961-1962).

There was extensive testimony by Levy and Ray Kives, executive Vice President of K-Tel International Inc., an independent television merchandising company which com-

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* On the contrary, by accepting the testimony of these witnesses as true, Judge Griesa made at least an implicit finding that Lennon was lying when he denied having made these statements (Lennon, A. 1930, 1933, 1941). During the trial, Judge Griesa noted that if he found Lennon was not telling the truth about whether he told these witnesses he was making an album for Levy, he would have difficulty believing Lennon's testimony as to what took place at the Cavallero meeting. (A. 2280-2281.)

petes with Adam VIII (Kives A. 762; Levy, A. 109), that a television campaign for an album can be limited to mail order alone or can be coupled with a retail fulfillment center program (Kives, A. 762; Levy, A. 94, 108, 110, 1861). Levy testified without contradiction that Adam VIII had sold millions of albums exclusively through mail order (A. 1861, 1896-1897).

When Levy asserted at the Cavallero meeting that the consent of EMI and Capitol was not necessary for United States mail order rights, he was relying on two sources:

1. In 1973, Allen Klein, the then manager of the Beatles, had started negotiations with Levy for a Beatles' television album which never came to fruition. During these negotiations, Klein had told Levy that the Beatles controlled their United States mail order rights (Levy, A. 1536-1537).

2. Levy had read an interview with Klein in the November 1971 issue of "Playboy Magazine" (PX 10 at E 3). In that interview, Klein described how, after taking over as manager of the Beatles, he had managed to renegotiate their contracts with EMI and Capitol in order to give them greater rights over their products:

> ". . . we worked out a new contract. We got the boys [the Beatles] increased royalties, but more important than that, we got them total control and ownership of their product in America." (Id. at E 8.)

Although the district court expressed the view, in assessing punitive damages against Adam VIII and Levy, that it was "reckless" for Levy to rely on what was said during the 1973 business negotiations with the Beatles' manager and confirmed in a published interview (A. 3474), the fact is that when defendants were compelled to produce their actual contracts during discovery, it turned out that what Levy had been told was entirely correct.

In 1969, EMI had granted an exclusive license to Apple (the Beatles' company, of which Lennon was president) to manufacture and distribute Beatles' records in North America but required Apple to enter into a contract with

EMI's United States subsidiary, Capitol, giving United States distribution rights to Capitol. However, the Apple-Capitol contract (DX C-2 at E 249) contained the following exclusion:

> **"ARTICLE III**
> **DISTRIBUTION**
>
> **1. Apple hereby grants to Capitol and Distributor and they each do hereby accept all of the rights which Apple derives under the Licensing Contract, *except* . . . (*ii*) *the distribution by mail direct to consumers* . . ."** (Emphasis supplied.)

Although Seider, who had been Allen Klein's assistant when the 1969 contract was negotiated, claimed that "distribution by mail direct to consumers" meant sales by record clubs (a contention which, we submit, was thoroughly demolished on cross-examination, see Seider, A. 1971-1996 generally and 1993-1996 in particular), Klein, the man who had negotiated the contract, testified unequivocally that the phrase "distribution by mail direct to consumers" was meant to refer to *all* types of mail order sales and not just sales through record clubs (A. 1566-1568).

Judge Griesa's own sharp questioning of Seider indicated that he found Seider's testimony simply not credible (A. 1977-1981).

Defendants then tried to fall back on a provision in the 1969 EMI-Apple agreement that "neither party may assign this Agreement or any part thereof or rights hereunder without the written consent of the other" (DX D at E 275) and from this attempted to argue that even if the Apple contract had excluded the mail order rights from the Capitol contract, it still could not give them to someone like Levy without EMI's consent.

In presenting this argument, defendants ignored the fact that Levy was not claiming an *assignment* of television mail order rights from Apple; he was merely claiming a limited *license*.

There is a well-recognized distinction between assignments and licenses. An "assignment" is a transfer of

right, title and interest. A "license" is a permission to act. *Waterman* v. *Mackenzie,* 138 U.S. 252 (1891); *Agrashell, Inc.* v. *Hammons Products Co.,* 352 F.2d 443 (8th Cir. 1965); *Watson* v. *U.S.,* 222 F.2d 689 (10th Cir. 1955); *American Optical Co.* v. *Curtiss,* 59 F.R.D. 644 (S.D.N.Y. 1973); *First Fin. Marketing Servs. Group, Inc.* v. *Field Promotions, Inc.,* 286 F. Supp. 295 (S.D.N.Y. 1968); and *Von Brimer* v. *Whirlpool Corp.,* 362 F. Supp. 1182 (N.D. Cal. 1973).

This distinction is also followed in the field of copyright. H. Ball, *The Law of Copyright and Literary Property,* §§ 236 and 237; *Nimmer on Copyright,* § 119.

Allen Klein confirmed that the EMI-Apple contract had been drawn with that distinction in mind (Klein, A. 1573-1574), and that it was his understanding that:

> ". . . Apple had the right to license mail order rights to someone else without the consent of EMI or Capitol" (Klein, A. 1574).

Since Big Seven received only the permission to market and sell a Lennon recording for one television campaign solely by mail direct to consumers, Big Seven was granted but a license, and the EMI-Apple "no assignment" clause is consequently wholly inapplicable.

Moreover, even if the grant to Big Seven were an assignment rather than a license, this still would not mean that the grant was not effective.

The law in New York is clear that restrictions on assignments are not favored and are strictly construed. See, *e.g.,* *Belge* v. *Aetna Casualty & Surety Co.,* 39 A.D. 2d 295 (4th Dept., 1972), 3 N.Y. Jur. *Assignments* § 101. Indeed, the New York courts take the position that:

> "A basic rule of construction of non-assignability clauses is that *in the absence of language explicitly barring assignment of a contract right so as to provide that any assignment of it shall be void,* a clause prohibiting assignment will be interpreted as a personal covenant not to assign. Thus, *a breach of covenant not to assign* creates a right in the contract obligee

> . . . to recover against the obligor-assignor . . . any damage suffered by reason of the assignment, but it *does not affect the transfer of contract rights to the assignee." Belge* v. *Aetna Casualty & Surety Co., supra,* 39 A.D. 2d at 297 (Citations omitted) (Emphasis supplied).

See also, *Burck* v. *Taylor,* 152 U.S. 634 (1894), 4 Corbin, *Contracts* § 873, and Restatement, *Contracts,* § 176:

> "A prohibition in a contract of the assignment of rights thereunder is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor by the assignment. . . ."

Furthermore, the rule is that the assignor (in this case Apple acting through its President, Lennon)* is not permitted to assert the invalidity of the assignment. 4 Corbin, *Contracts,* § 873.

In any event, the district judge did not make any findings with respect to these matters. Instead he held that irrespective of whether Lennon and Apple had the *right* to license Big Seven or Adam VIII to distribute a Lennon album by mail order:

> "There is no substantial evidence that the parties to the October 8 meeting singled out the United States mail order rights, as distinct from all other rights, and 'agreed' that Lennon had the ability to convey the former to Levy." (A. 172a.)

The district court's opinion went on to state:

> "It should be noted that Levy, according to his own testimony, described both mail order and retail fulfillment center distribution to Lennon and Seider. If the parties then agreed to forego Levy's retail fulfillment center distribution and proceed only with mail order sales, one would expect some specific discussion to this effect. *Even Levy's testimony fails to reveal anything*

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* There was extensive evidence that Lennon, as President of Apple, had actual and apparent authority to bind Apple (Seider, A. 2112-2113; Klein, A. 1616, 1618; E 152; E 270; E 279).

of this kind, and I find that no such discussion occurred." (A. 173a) (Emphasis supplied.)

The district judge was clearly wrong on this point. Contrary to his finding that Levy's testimony fails to reveal that there was any such discussion, the record shows that Levy expressly testified as follows:

"Q. Now, was there any discussion at the October 8th meeting that you would go ahead with U.S. mail order sales alone, even if EMI's consent could not be obtained for foreign and retail fulfillment center rights?

A. That is basically the deal we made, that we had a mail order deal and we would proceed as of that date and finish up the album.

The Court: He is asking if there is any specific discussion of your going forward with mail order only if you could not get the retail and foreign rights, in other words, any specific discussion, anything anybody said about the possibility of your going forward with mail orders only in the United States?

The Witness: Yes.

The Court: Do you recall anything that was said about that? In other words, did somebody say, 'Well, if this does not go on retail it will go by mail order only?' Did Mr. Lennon or Mr. Seider or May Pang say it? That is what we are asking.

The Witness: When we discussed the mail order package and I said I had knowledge that mail order rights were with Apple, there was agreement on that there. Then we discussed that Mr. Seider would go and get the rights from EMI for the retail fulfillment and the foreign, and then, we still decided to go ahead. In other words, we were still going ahead, even though we were aware that Mr. Seider was going to get the rights for the fulfillment and the foreign, but we would go ahead on mail order. In precise words that is what we arrived at; that is what we proceeded to do at the end of the meeting." (Levy, A. 1863-1864.)

It would appear that the trial judge simply overlooked Levy's crucial testimony on this point, although plaintiffs' counsel did call it to his attention during summation (A. 2342).

Similarly, Judge Griesa's suggestion (A. 167a-168a) that plaintiffs and Levy had shifted their position, first claiming worldwide rights and then narrowing their claim to domestic mail order rights is not supported by the record.

Levy testified in his deposition and again at trial that at the Cavallero meeting it was agreed that he could get United States mail order rights and that Seider would check whether EMI's or Capitol's consent was required for the *other* rights. (Levy, A. 1863-1864.)

Levy also testified in his deposition and again at trial that in November 1974 Seider told him that it was unnecessary to see EMI and that there would be no problem with Capitol (Levy, A. 293-294).

Thus, when Levy wrote his January 9, 1975 letter to Lennon's lawyers, which they never answered, he asserted his maximum claim of world-wide rights (PX 31 at E 30). Similarly, in our pleadings in this action we asserted the maximum possible claim of world-wide rights but plaintiffs' counsel, in his opening statement, carefully explained the distinction plaintiffs were drawing between United States mail order rights and retail fulfillment and foreign rights (A. 28-30).

When the evidence at trial confirmed that Seider had engaged in a deliberate course of double dealing and, far from attempting to get EMI's and Capitol's consent, had in fact induced Capitol to persuade Lennon to bypass Levy completely (see pp. 27-29, *supra*), plaintiffs conceded that their claim for damages had to be limited to United States mail order rights, for which EMI's and Capitol's consents were not required (A. 1647-1649).

There was agreement as to royalties

Levy and Kahl testified that at the Cavallero meeting it was agreed that Lennon would receive a royalty of 12% of the selling price of $4.98, that Lennon and Apple would

take care of recording costs and obligations to Phil Spector, the original producer, and that Levy's company would pay for the pressing, publishing, advertising, copyrights, making of the commercials and fulfillment of orders (see page 14, *supra*).

Lennon did not contradict this testimony but merely said that he left the discussion of business terms to Seider (Lennon, A. 711). Seider claimed that while there was a discussion of the $4.98 price at which television albums were to be sold (Seider, A. 2027), the amount of the royalty was not discussed until a later meeting with Levy (Seider, A. 1209-1210) when Seider told Levy that Lennon's royalty is 12% (Seider, A. 1209). Lennon's other attorney, Michael Graham, showed in his notes that Lennon's royalty should be 60¢ which is 12% of $4.98 (DX GGGG at E 491).

Neither during the trial nor in his opinion did Judge Griesa state that he questioned the credibility of Levy or Kahl on this point, and he gave no reason why he chose to disregard Levy's and Kahl's testimony.

On the other hand, the trial judge made it very clear during the summations on Phase I of the trial that he had strong doubts about the veracity of Seider and Lennon.

For example, Judge Griesa stated:

> "Now, another thing—and I brought this up at the trial—I have never felt that I was getting the complete story about what was going on in the minds of Seider and Lennon as far as their view of this deal." (A. 2281.)

Again, in discussing Lennon's repeated denials that he had told independent witnesses that he was "making an album for Morris", Judge Griesa had the following colloquy with Lennon's trial counsel:

> "The Court: I don't know that there is much we can do in discussing it. I just wonder. I do not just think they would be lying to me, Masucci, Crocker, Sheresky. Are they so much in the control of Levy that they would come in here and perjure themselves?
>
> Mr. Bergen: Assume for the sake of the question

that Mr. Lennon did say that, what does that have to do whether a deal was made on October 8, when all other indications point to the fact that there was not a deal made.

The Court: It has weight in one way, and maybe not so much weight in another way. *It goes to credibility. And if I should believe that Mr. Lennon and Mr. Seider were slanting their testimony on certain points because of their interest in the case, the question I got to wrestle with, naturally, is what other points are they slanting their testimony on.* In other words, it's very important to me on the question of credibility to know whether witnesses are telling the truth on points, even though maybe they are not the major break points of the case. I don't say it is a major break matter whether Mr. Lennon said, 'I am making this for Morris' or not.

I agree with you. It could be just an expression of optimism, an expression of hope. *But if he is coming in to court and if he is not giving me an accurate picture on it, what about the accuracy of his statements as to October 8.*" (Emphasis supplied) (A. 2280-2281.)

Since the trial judge did not make any actual findings of fact in regard to royalties, or in regard to the credibility of the witnesses who testified on this issue, but instead simply made the conclusory statement that "I find that plaintiffs have not shown that there was any agreement on the amount or method of calculation of the royalty" (A. 173a-174a), it is impossible to say why he ignored the detailed testimony of Levy and Kahl while accepting the contrary testimony of Seider and Lennon, whose veracity the trial judge had questioned in open court. We submit that the trial judge was in error on this issue and that the weight of the evidence showed that a royalty of 12% had been agreed upon.

However, even if one were to accept Seider's testimony that at the October 8 meeting the parties spent hours discussing the making of a television album by Lennon to be

sold at a price of $4.98 without once touching upon the question of Lennon's royalty, that does not end the matter from a legal standpoint.

The very October 1973 Settlement Agreement, whose terms were spelled out by experienced record industry lawyers in open court, and which was approved by Judge Griesa, did not specify the royalties to be paid but merely provided that the license which Apple would grant to Big Seven would be:

> ". . . at Big Seven's customary rates, whatever they may be at the current time, and with such advances which are in current practice which I [Michael Graham, Esq., attorney for Lennon and Apple in the copyright infringement action] understand to be a nominal advance." (PX 11 at E 16)

Graham confirmed this royalty arrangement in his letter to Lennon, which spelled out the terms of the contract in more formal language, and Lennon countersigned it (PX 12 at E 19).

Despite this absence of express royalty terms in a settlement agreement worked out by experienced lawyers in open court, neither the parties nor Judge Griesa assumed for one moment that the October 1973 Settlement Agreement was unenforceable.

The October 1973 Settlement Agreement also did not contain express terms covering duration, territories, prices, pressing, advances, titles of albums, approval of lacquers, masters and other details (PX 11 at E 13 *et seq.*). Seider admitted that these are not essential terms in order to have an enforceable contract (Seider, A. 2156).

Accordingly, even if the trial court were correct in its conclusion that the parties did not expressly agree on a royalty rate of 12% at the Cavallero meeting, the evidence showed that there was agreement on all other aspects of the deal and that Lennon was therefore entitled to his customary royalty of 12%.

Summary

In sum, we submit that the evidence as a whole does not support Judge Griesa's conclusion that there was only a "tentative agreement for Lennon to provide 15 or 16 rock and roll songs *in the event* that Lennon in fact made a record album for Levy." (A. 173a) (Emphasis supplied by court.) The evidence shows that Lennon agreed to make, did make, and told others that he was making, a record album for Levy.

The evidence shows that while the parties may not have used formal contract language (an oral agreement rarely employs the type of express language found in a formal written contract), they came away from the Cavallero meeting with an understanding on the essential terms of the deal and proceeded to perform accordingly until January 28, 1975 when Capitol (at Seider's urging) persuaded Lennon to drop his television package deal with Levy and to allow Capitol to distribute the album through regular retail channels.

The decision below should accordingly be reversed and remanded for further proceedings to determine the damages caused to plaintiffs by Lennon's and Apple's breach of contract and by Lennon's, Apple's and Seider's participation in a conspiracy to cause suppliers and television stations to boycott the Adam VIII album and their commission of other torts.

II

The trial court erred in assessing compensatory and punitive damages of $419,800 against Adam VIII and Levy.

In the second phase of the case, relating to defendants' counterclaims, Judge Griesa assessed compensatory and punitive damages of $419,800 against Adam VIII and its President and controlling stockholder, Morris Levy, and granted defendants injunctive relief.

We respectfully submit that the trial court erred on the law and on the facts and that the judgment below should be reversed for failure of proof on the part of the defendants and by reason of the trial court's highly prejudicial errors in the conduct of the trial.

Levy is submitting a separate brief on this phase of the case and, in order to avoid duplication, Adam VIII will refrain from arguing this point here and respectfully joins in all aspects of Levy's brief.

Levy does not claim in his brief that he should be treated differently from Adam VIII. Accordingly, all of Levy's arguments are equally applicable to Adam VIII.

Adam VIII therefore respectfully requests that the judgment on the counterclaims be reversed for the reasons set forth in Levy's brief.

III

The trial court erred in limiting Big Seven's damages arising out of Lennon's breach of the October 1973 Settlement Agreement and refusing to enforce a portion of that Agreement.

After Judge Griesa held that the October 1973 Settlement Agreement had not been superseded by an agreement made at the October 1974 Cavallero meeting, plaintiffs requested and were granted leave to amend their complaint to seek alternative relief (without conceding that the trial court's first decision was correct) for Lennon's breach of the October 1973 Settlement Agreement, so that both issues could be reviewed on appeal. If this Court should reverse the decision below, as requested in Point I of this brief, then this argument under Point III would become moot.

The trial court concluded that Lennon had breached the Settlement Agreement by including only two Big Seven songs in his "Rock 'n' Roll" album.* While the district

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* The court resorted to extrinsic evidence to determine that the reference to "next" album in the Settlement Agreement was in-

(footnote continued on the following page)

court awarded $6,795 damages for lost mechanical royalties based on "Rock 'n' Roll's" actual sales of 342,000 albums, the court refused to allow:

1. Damages for the loss of "cover record" income.

2. Damages for lost royalties of Big Seven's foreign subsidiaries.

3. Enforcement of the second part of the Settlement Agreement.

A. The loss of "cover record" income

As defined by Lennon's own expert:

> "A cover record is any record which is recorded and released after the initial record." (Robinson, A. 3873.)

Big Seven contended that if Lennon had recorded an additional Big Seven song, it would have generated not only mechanical royalties from Lennon's own recording but, because of the interest generated by Lennon's version, other artists would have been induced to record the same song, thereby generating additional royalties and enhancing the value of the copyright.

To support its claim that this is a well-recognized phenomenon in the industry, Big Seven not only offered several examples of its own but also called as expert witnesses three of the most prominent music publishers (the trade term for copyright owners) in the industry:

Norman Weiser, President of Chappell Music Company, the largest music publishing company in the world (Weiser, A. 3632).

(footnote continued from preceding page)

tended to mean the Spector "oldies" album rather than the next album in point of time (A. 193a-195a). We believe the trial court was wrong on this point because there was no ambiguity in the Settlement Agreement made in open court which required resort to parol evidence. However, since this error has no significant impact on the damages computations, we will not press it here.

Murray Deutsch, President of the New York Times Music Corporation (Deutsch, A. 3622).

Fred Bienstock, the owner of the Hudson Bay Company in the United States and Carlin Music in England (Bienstock, A. 3568).

These three independent experts testified that in their opinion Big Seven would have earned substantial additional copyright royalties from cover records if Lennon had recorded an additional song from Big Seven's copyright catalog (Weiser, A. 3633; Deutsch, A. 3625-3626; Bienstock, A. 3576).

Weiser stated that the value of a copyright would be enhanced by as much as $150,000 in the case of a classic rock and roll song rerecorded by Lennon (A. 3634). He explained that as a result of the new recording, the song would be brought to the attention of other artists who, in turn, might record the song (A. 3633). Deutsch and Bienstock corroborated this testimony (Deutsch, A. 3624-3625; Bienstock, A. 3572-3574).

Each of the experts cited examples of cover records. Bienstock produced detailed schedules (PX 451 at E 201) to show that a song named "Close to You", which had been earning relatively little, suddenly jumped in value when rerecorded by a singing group named "The Carpenters". After The Carpenters put out their version, the song earned additional copyright royalties of $339,000, of which at least two-thirds ($226,000) was attributable to cover records by artists who had followed The Carpenters (A. 3618-3619; PX 451 at E 201).

Bienstock stated that he knew of no instance where a recording by a prominent artist did not result in additional cover record royalties (A. 3576). He testified that in his opinion Lennon was so prominent that a recording by Lennon could have resulted in even greater cover record income than that caused by The Carpenters (A. 3576-3577).

Judge Griesa stated during the trial that he was very impressed by the testimony of Messrs. Weiser, Deutsch and Bienstock and that he did not doubt that a recording

by Lennon of a Big Seven song would enhance the value of the copyright:

> ". . . you had witnesses who were, I thought, very logical, understandable and persuasive. I will tell you now that the recording by Lennon of a song would as a general proposition enhance the value of the copyright in that song . . . Anybody sitting here would have been impressed with those men." (A. 3820.)

Indeed, the trial judge went so far as to say:

> "Now, I say to you my present intention, unless there is some very persuasive rebuttal, I think that the testimony is pretty convincing that as a general proposition the value of the copyright is enhanced. *I believe it is my job to make an estimate, some reasonable estimate of what that would have been,* just as I tried to do in the case of Capitol's claim and Lennon's claim before.
>
> *I think it would be very hard to convince me that there was just no enhancement.*" (A. 3821) (Emphasis supplied.)

Lennon's rebuttal consisted of attacking certain examples of cover records offered by Big Seven and of calling a single expert witness, Irwin Robinson, a lawyer who was the Vice President of Screen Gems Columbia Music, a division of Columbia Pictures Industries, Inc., who expressed the view that a recording by Lennon of "Angel Baby", the song which Lennon deliberately dropped from "Rock 'n' Roll" upon the advice and with the concurrence of Seider (Lennon, A. 919), would not have generated any cover records (Robinson, A. 3881-3882).

In his decision, Judge Griesa refused to award Big Seven a single penny for lost cover record income. He based his refusal to award any such damages on two factors:

1. The aforesaid testimony of Robinson; and

2. The fact that certain examples offered by Big Seven (in contrast to other examples) did not support Big Seven's

claim that cover records would have generated substantial additional earnings.

Robinson's opinion, however, was squarely inconsistent with that of Lennon, who testified that "Angel Baby" was one of his "favorite" songs (A. 715). If it was a Lennon favorite, then why should it not have appealed to other singers? This point was never clarified by Robinson or anyone else.

While it is true that one cannot establish with absolute certainty that Lennon's recording of "Angel Baby" or any other Big Seven song would have led other artists to produce cover records, the reason for this uncertainty is Lennon's own breach of the October 1973 Settlement Agreement.

There is no question here that Lennon's deliberate failure to record the third Big Seven song was the necessary, immediate and direct cause of damage to Big Seven which lost the opportunity to have one of its songs performed by this prominent artist. The only question is the *amount* of damages and yet the trial court, despite compelling testimony of three leading experts that a Lennon recording was likely to lead to lucrative cover records, refused to award any damages whatsoever.

This is not like the situation discussed in Levy's separate brief where defendants presented no proof of a causal relationship between the release and promotion of "Roots" and the alleged injuries to defendants. Here, the moment Lennon dropped the third Big Seven song there was clearly some damage to Big Seven and the only remaining issue was: How much? The different rules for proving the existence of damages and proving the amount of damages are set forth in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), discussed more fully in Point II of Levy's separate brief.

We must respectfully contrast the trial judge's ultra-conservative approach to an assessment of damages in this phase of the case with his open-handed award of almost $400,000 to Capitol, EMI and Lennon for lost profits and royalties despite the fact that the judge himself charac-

terized the witnesses who sought to establish defendants' damages on the counterclaims, who were primarily Capitol executives, as "people who are trying to collect damages, and they just give opinions to back them up" (A. 2659), in contrast to Big Seven's expert witnesses in Phase III of the case who were well-known, independent music publishers.

While some of the examples offered by Big Seven to support its claim for cover record damages turned out to be weak and even incorrect, the examples cited by the independent experts did support the claim. The district judge did not explain why he focused solely on the weak examples and rejected the strong examples, such as Bienstock's testimony that cover records following a Lennon recording of rock and roll songs should have generated substantially more than $200,000 in additional royalties.

Taking the evidence as a whole, we submit that the trial court erred in refusing to award any damages whatsoever for lost cover record royalties.

We respectfully request that this Court determine additional damages on the basis of the evidence already in the record, or, in the alternative, remand the case to the district court with instructions to determine additional damages.

B. Lost royalties of Big Seven's foreign subsidiaries

In Phase II of this case, Judge Griesa awarded lost profits to Capitol for losses sustained by Capitol's Canadian subsidiary (A. 3471-3472), even though the subsidiary was not a party to the action. Yet, when Big Seven made a claim for losses of its foreign subsidiaries, the trial court rejected it (A. 199a).

We respectfully submit that parties in the same case are entitled to equal treatment. While we do not concede (for the reasons stated in Levy's separate brief) that Capitol or its subsidiary were entitled to any damages at all, if it was indeed proper to award lost profits to Capitol for the

benefit of its foreign subsidiary, then Big Seven is equally entitled to additional royalties of $3,374* for the benefit of its own foreign subsidiaries.

C. The trial court's refusal to enforce the second part of the October 1973 Settlement Agreement

The court below held that Lennon satisfied his obligations under the second part of the October 1973 Settlement Agreement (See pp. 7-8, *supra*) when his lawyers wrote a letter to Big Seven on December 31, 1974 offering a choice of Apple masters (PX 30 at E 29) and Levy rejected the offer in his letter of January 9, 1975 in which he claimed that there had been a superseding agreement in October 1974 (PX 31 at E 30), a letter which was never answered by Lennon's attorneys (Seider, A. 2089).

Leaving aside the fact that Lennon's December 31, 1974 letter was untimely (a point which Judge Griesa brushed aside as of no weight), we nevertheless maintain that the trial court was in error:

1. Because Lennon did not tender full performance and New York law draws a critical distinction between an offer to enter into a license and an actual tender of a license.

2. Because there was no showing that Levy's erroneous reliance on what he believed to be a superseding October 1974 agreement and his consequent delay in seeking to enforce the October 1973 Settlement Agreement resulted in any prejudice whatsoever to Lennon so as to estop Big Seven from enforcing the original agreement according to its terms.

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* At A. 197a, the district court found that if a third Big Seven song had been included in "Rock 'n' Roll", the gross royalties which would have been collected by Big Seven's foreign subsidiaries would have been $16,872. After deduction of $3,374 for costs of foreign sales, earnings would be $13,498. Half of this sum would be payable as a royalty to the song's writer, leaving a total of $6,749. The district court granted Big Seven damages of $3,375, the portion of the $6,749 which the subsidiaries would remit to Big Seven. However, Judge Griesa refused to award Big Seven damages for the remaining $3,374 which the foreign subsidiaries would retain as their share of the royalties.

PX 30, the December 31, 1974 letter from Lennon's attorney to Big Seven, did not satisfy the terms of the October 1973 Settlement Agreement since it did not even purport to grant Big Seven a license. At most it offered Big Seven the opportunity of entering into a license agreement with Apple.

The entire text of the offer is as follows:

> **"In accordance with the stipulation of settlement entered into on October 12, 1973 with respect to the above-entitled matter, please be advised that the following master recordings are available for licensing and that you may select three (3) of the following: (list of songs deleted)" (E at 29.)**

No mention is made of the terms of the license, which is significant in view of the fact that the resolutions (DX CE at E 319) adopted by Apple which authorized Lennon to offer Big Seven a license differ in material respects from the terms required by the October 1973 Settlement Agreement. The Apple resolution, for example, authorizes the license to be granted at a royalty rate of 2¢, whereas the October 1973 Settlement Agreement provides that the license is to be at Big Seven's "customary rates". Moreover, the Apple resolution provides for a duration of not more than 10 years, while the October 1973 Settlement Agreement is silent on the duration of the license.

Consequently, Lennon's attorneys' letter of December 31, 1974 can only be viewed as the opening offer in a negotiation for a license, rather than as the tender of the actual license itself.

The distinction between the tender of the license and the offer to enter into a license is crucial. It has long been the established law of New York that only a valid tender of performance satisfies the obligations under a contract and that a valid tender requires not only readiness and ability to perform, but actual production of the thing to be delivered. *Eddy* v. *Davis*, 116 N.Y. 247 (1889), *Jamaica Savings Bank* v. *Sutton*, 42 A.D.2d 856 (2d Dept. 1973), and *Novik* v. *Bartell Broadcasters of New York, Inc.*, 66 Misc. 2d 857 (Sup.Ct. N.Y. Co. 1971).

Moreover, even if Lennon's offer of December 31, 1974 were viewed as tantamount to a tender of performance (which Big Seven, for the reasons set forth above, denies), there is no reason to grant Lennon the windfall of escaping all obligations to perform under the second part of the October 1973 Settlement Agreement simply because Big Seven erroneously believed that the October 1973 Settlement Agreement had been superseded by an oral 1974 Settlement.

Lennon will suffer no prejudice if he is now compelled to carry out a settlement which he made in open court. He is as able now as he was on December 31, 1974, to enter into a licensing agreement with Big Seven and there is no reason why he should not be compelled to perform as agreed or, in the alternative, to pay Big Seven appropriate monetary damages.*

Conclusion

The judgment below should be reversed and the case remanded for a determination of plaintiffs' damages for defendants' breach of contract, defendants' violations of the antitrust laws and defendants' common law torts.

In the alternative, if this Court affirms the district court's decision that plaintiffs failed to prove the making of the October 1974 contract, then:

1. The judgment awarding defendants compensatory and punitive damages of $419,800 on their counterclaims should be reversed in all respects for the reasons set forth in Levy's separate brief; and

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* The district court ruled that it would not accept any proof of damages with respect to non-performance by Lennon of the second part of the Settlement Agreement and that it would only consider the question of whether specific performance would be appropriate (2344a71-2344a72). While Big Seven would prefer specific performance of part two of the Settlement Agreement, it is prepared, in the alternative, to present proof of damages resulting from non-performance.

2. The judgment relating to Lennon's breach of the October 1973 Settlement Agreement should be modified so as to provide for additional damages in favor of Big Seven based on lost "cover record" profits and foreign sales and for an order directing Lennon to perform the second phase of the October 1973 Settlement Agreement or, in the alternative, awarding appropriate money damages.

Dated: November 19, 1976.

Respectfully submitted,

WALTER, CONSTON, SCHURTMAN & GUMPEL, P.C.
Attorneys for Plaintiffs-Appellants Big Seven Music Corp. and Adam VIII, Ltd.
280 Park Avenue
New York, New York 10017
(212) 682-2323

WILLIAM SCHURTMAN
ALAN KANZER
BERNARD R. DIAMOND,
Of Counsel

(60716)

United States Court of Appeals
For the Second Circuit

Big Seven Music Corp. and Adam VIII, LTD.,
Plaintiffs-Appellants,

against

John Lennon, Apple Records, Inc., Harold Seider,
Capitol Records, Inc. and EMI Records Limited,
Defendants-Appellees,

and

Morris Levy,
Additional Defendant on Counterclaim-Appellant.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Jerry N. Simmons, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 25 Elliott Place Bronx, N.Y. 10452

That on Nov. 19, 1976, he served

One Appendix Volume 1-6 and one Exhibit Volume and two Briefs on behalf of Plaintiffs-Appellants and Additional Defendant on Counterclaim-Appellant.

On:
Marshall Bratter Greene Allison & Tucker, Esqs.
430 Park Avenue
New York, N.Y. 10022

Cleary, Gottlieb, Steen & Hamilton, Esqs.
One State Street Plaza
New York, N.Y. 10004

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Jerry N. Simmons

Sworn to before me this
19 day of November, 1976

JOHN [illegible]
Notary [illegible] York
Q [illegible] 19